

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VALLEY HOSPITAL MEDICAL CENTER, INC.
Employer

and

Case 28-RD-192131

JENNIFER YANT
Petitioner

and

SEIU LOCAL 1107
Union

ORDER

The Employer and the Petitioner's Requests for Review of the Regional Director's determination to hold the petition in abeyance are denied as they raise no substantial issues warranting review.¹

¹ The Board agrees with the holding of the petition in abeyance pending the investigations of unfair labor practice charges in Cases 28-CA-185013, -189730, and -192354. We agree with our colleague that the Union's more recent charge alleging an unlawful withdrawal of recognition in Case 28-CA-193581, further justifies holding the petition in abeyance.

Contrary to our colleague's criticism of the Board's longstanding blocking charge policy, we find it continues to serve a valuable function. As explained in our 2014 rulemaking, the blocking charge policy is critical to safeguarding employees' exercise of free choice. See Representation-Case Procedures, 79 Fed. Reg. 74308, at 74418-74420, 74428-74429 (Dec. 15, 2014). Indeed, "[i]t advances no policy of the Act for the agency to conduct an election unless employees can vote without unlawful interference." Id. at 74429. Nevertheless, in response to commentary and our colleague's concerns, the Election Rule modified the policy to limit opportunities for unnecessary delay and abuse. Id. at 74419-20, 74490.

We also observe that in upholding the Election Rule, the U.S. Court of Appeals for the Fifth Circuit recently rejected an argument similar to our colleague's and those advanced in the Petitioner's Request for Review, and found that the Board did not act arbitrarily by implementing various regulatory changes resulting in more expeditious processing of representation petitions without eliminating the blocking charge policy altogether. See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 228 (5th Cir. 2016). In doing so, the court cited with approval its prior precedent in *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974), wherein the court set forth the following explanation for why the blocking charge policy is justified:

If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by his own wrongdoing. In the absence of the 'blocking charge' rule,

PHILIP A. MISCIMARRA,

CHAIRMAN

MARK GASTON PEARCE,

MEMBER

many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. . . .

Nor is the situation necessarily different where the decertification petition is submitted by employees instead of the employer or a rival union. Where a majority of the employees in a unit genuinely desire to rid themselves of the certified union, this desire may well be the result of the employer's unfair labor practices. In such a case, the employer's conduct may have so affected employee attitudes as to make a fair election impossible.

Id. at 1029 (quoting *NLRB v. Big Three Industries, Inc.*, 497 F.2d 43, 51-52 (5th Cir. 1974)).

Chairman Miscimarra favors a reconsideration of the Board's blocking charge doctrine for reasons expressed in his and former Member Johnson's dissenting views to the Board's Election Rule, 79 Fed. Reg. 74308 at 74430-74460 (Dec. 15, 2014), but he acknowledges that the Board has declined to materially change its blocking charge doctrine, which was the basis for the Regional Director's determination to hold the petition in abeyance. Chairman Miscimarra further notes that the Union filed a more recent charge in Case 28-CA-193581 alleging that, after the Regional Director's determination, the Employer unlawfully withdrew recognition from the Union. Under existing law, that charge, which remains pending, would warrant holding any election in abeyance until the charge is resolved. Without prejudging the legality of the Employer's withdrawal of recognition, Chairman Miscimarra believes the facts presented here illustrate one of the problems associated with the blocking charge doctrine, which prevented the employees from exercising their right to an election, leaving the Employer's withdrawal of recognition as the only potential means to give effect to expressed sentiments by a majority of unit employees disfavoring union representation. This outcome, which delays any election indefinitely pending resolution of alleged unfair labor practice charges (rather than conducting an election subject to potentially setting it aside if pre-election charges are found to have merit), is directly contrary to the Board's Election Rule, in which the majority adopted a policy requiring elections to take place at the "earliest date practicable," with disputes regarding election-related issues—including alleged objectionable conduct—to be resolved after the election. Election Rule Sec. 102.67(b); see also 79 Fed. Reg. at 74405, 74422.

The U.S. Court of Appeals for the Fifth Circuit has found the Board's application of its blocking charge policy justified in some cases and unjustified in others. Compare *Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974) (dismissing for lack of jurisdiction lawsuit seeking to compel Board to process blocked decertification petition) with *Templeton v. Dixie Printing Co.*, 444 F.2d 1064 (5th Cir. 1971) (rejecting application of blocking charge policy); *Surratt v. NLRB*, 463 F.2d 378 (5th Cir. 1972) (same). These cases all recognize that the Board's blocking charge policy can result in considerable delay in resolving representation issues; as the court noted in *Bishop*, supra, 502 F.2d at 1026, "justice delayed is justice denied..." As noted above, however, in the Election Rule the majority declined to make any changes in the blocking charge doctrine. In concurring with the majority's denial of review here, Chairman Miscimarra does not rely on the conduct alleged in Cases 28-CA-189730 or -192354.

LAUREN McFERRAN,

MEMBER

Dated, Washington, D.C., July 6, 2017.